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IN THE

Supreme Court of the United States

Term — 1961

No. 952

MARYLAND CASUALTY COMPANY,

Petitioner,

versus

HARRY H. HALLATT, Individually and as Executor of the Estate of MARY VALENTINE HALLATT, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

This petition for Writ of Certiorari brings here for review the petition and judgment of the United States Court of Appeals for the Fifth Circuit, entered January 10, 1964, reported at *326 F. 2d 275*, in which the court vacated and set aside its former opinion and judgment *(295 F. 2d 64)*, entered at a previous term of court on

October 6, 1961, and reinstated a judgment entered June 17, 1960, which had been reversed, remanded and retried in accordance with the court's opinion of October 6, 1961 (R. 163, 168, App. 5).

JURISDICTION

The judgment of the Court of Appeals is dated and was entered January 10, 1964 (R. 163, 168, App. 6). By order dated February 20, 1964 the court denied petitioner's timely petition for rehearing (R. 169, 176, App. 8). The jurisdiction of this court is invoked under *28 U.S.C., § 1254(1)*.

QUESTIONS PRESENTED FOR REVIEW

1. Does the Court of Appeals have jurisdiction to vacate and set aside its opinion and judgment after the expiration of the term of court in which the judgment was rendered and after denial of certiorari by the United States Supreme Court and a remand and retrial of the case in the court below.

2. Is a court of appeals in a diversity case authorized to reinstate a judgment of the district court which it has reversed and remanded for a new trial, merely because of a change in the decision law of the state occurring after the retrial, where the appellant has failed to put in issue any point of decision on which the intervening state court decision is based. May the court of appeals under such circumstances ignore completely the appeal taken from the judgment on retrial, and proceed to vacate its former opinion and judgment under the guise of considering a petition for rehearing.

STATUTES INVOLVED

The statutes and rules of court involved are *28 U.S.C. 48* (App. 37) and *Rule 3 of the Rules of the United States Court of Appeals For the Fifth Circuit* (App. 38).

STATEMENT OF THE CASE

The Facts

HARRY H. HALLATT and MARY VALENTINE HALLATT, his wife (now deceased) brought a writ of garnishment against MARYLAND CASUALTY COMPANY, to satisfy a personal injury judgment in the sum of $9,267.52. The garnishment action was tried in the United States District Court for the Southern District of Florida, which had jurisdiction of the controversy by reason of diversity of citizenship. The action sought to reach the proceeds of an automobile liability policy issued by Maryland to the judgment debtor, James R. Richardson. Maryland contended that the insured's noncooperation violated the policy condition and voided the coverage. Richardson had failed and refused to attend the trial of the personal injury suit brought by the Hallatts, though duly and repeatedly notified by Maryland of his duty under the policy to attend (App. 14). The Court of Appeals for the Fifth Circuit on October 6, 1961 reversed a judgment against Maryland, holding that the failure of the insured to attend the trial was prejudicial to the insurer as a matter of law; and that the lower court committed error in admitting evidence on the question whether or not the failure was prejudicial. *295 F. 2d 64* (App. 10). This court denied certiorari on March 19, 1962 (*82 S. Ct. 830, 369 U. S. 819, 7 L. Ed. 2d 785*).

The cause was remanded to the district court for a new trial. Upon substantially the same evidence a verdict and judgment dated August 29, 1962 was rendered in favor of Maryland, from which the plaintiffs appealed (R. 6, 146).

After rendition of the judgment and during the pendency of the appeal the District Court of Appeal for the Third District of Florida rendered its decision in *Barnes v. Threshermen and Farmers Mutual Casualty Insurance Company, 146 So. 2d 119 (Cert. denied 153 So. 2d 305)*, which was critical of the Fifth Circuit's opinion *(295 F. 2d 64)*, and held that a showing of prejudice is necessary to a disclaimer of coverage on the grounds of noncooperation (R. 164, App. 2).

The question of prejudice or lack of prejudice to the insurer had not been placed in issue on the retrial of the case. Neither was it the subject matter of the appellant's statement of points on appeal (R. 149-159). Instead, the case was tried on the issue of whether there was a justifiable excuse for Richardson's nonattendance and whether Maryland acted in good faith and with due diligence in its efforts to secure the attendance of Richardson at the trial. The plaintiffs appealed to the Court of Appeals for the Fifth Circuit from a jury verdict and judgment in favor of Maryland (R. 1, 6, 146).

The Decision of The Court of Appeals

The matter then came on to be heard before the Court of Appeals on the Hallatts' appeal from the judgment after the retrial in which the question of prejudice had not been put in issue. With the case in this posture the

Court of Appeals did a strange thing. It ignored completely the judgment from which the appeal had been taken (the only matter properly before it) and proceeded to reconsider its former opinion of October 6, 1961, on plaintiffs' untimely petition for rehearing (R. 161), notwithstanding the fact that the opinion was rendered at a previous term of court; that the mandate had been sent down; that the cause had been remanded and retried. The Court granted the plaintiffs' petition for rehearing and vacated its initial opinion and ordered reinstatement of the original judgment of June 17, 1960. (R. 167)

REASONS FOR ALLOWANCE OF THE WRIT

1. The Court in vacating its opinion and judgment rendered at a prior term of Court was wholly without jurisdiction and its action in so doing was such a departure from established precedent as to call for the exercise of this Court's supervisory power.

Upon denial of certiorari by the Supreme Court and the going down of the mandate, the opinion of October 6, 1961 became final by passage of time. When the mandate in that appeal was lodged in the court below the thread of jurisdiction was cut. Such decision and judgment cannot thereafter be withdrawn or modified save upon exceptional grounds not apparent in this record. See *Raymond v. Wickersham*, 129 F. 2d 522, 529, wherein the court said:

> "(5) The principle of law which appellants seek to invoke here has been applied in appellate tribunals, under certain circumstances differing

> from those at bar, in a number of cases which are cited in 84 A.L.R. 595, under the heading, 'Power to reconsider a decision obtained by fraud.' It is sufficient to say that the great weight of authority there collected and discussed is to the effect that an appellate tribunal after its judgment has become final and the mandate issued, has no jurisdiction or power to recall its mandate or reverse or modify its judgment except and unless such action is based upon a fraud *perpetrated in and upon the appellate court itself*." (Emphasis by the court)

Public policy demands that there be some point in every judicial proceeding when the decision has become final, the train of jurisdiction cut, and the parties out of court. Upon the going down of the mandate and the expiration of the term of court, the decision of the court on the former appeal became absolute. Due consideration for the public and the litigants before the court command that a finality be reached somewhere in the proceeding. This is not to say that the plaintiffs may not bring on for review the judgment rendered on retrial of the case. But the court never considered that judgment on its merits. Instead of coming to grips with the only appeal which was properly before it, the court leaped over the judgment brought there for review and proceeded to reconsider a matter jurisdictionally foreclosed.

We readily concede that in reviewing the judgment rendered on retrial, the reviewing court will apply the law as it is at the time of the review. *Messenger v. Anderson, 225 U.S. 436; Johnson v. Cadillac Motor Car Co. (1919, C.A. 2 N. Y.), 261 F. 878, 8 A.L.R. 1023.* The court,

however, never undertook the task of reviewing that judgment on the record before it in the light of the most recent pronouncements of the Florida Court. It seems well established that a court of appeals is without any power to recall its mandate after expiration of the term at which the judgment was rendered and the mandate issued. *Foster Bros. Mfg. Co. v. National Labor Relations Board, 90 F. 2d 948; Deppe v. General Motors Corporation, 98 F. 2d 813, Cert. Denied 59 S. Ct. 462, 306 U.S. 633, 83 L. Ed. 1035, Rehearing Denied 59 S. Ct. 581, 306 U.S. 668, 83 L. Ed. 1063, and Petition Denied 59 S. Ct. 821, 307 U.S. 611, 83 L. Ed. 1494; Raymond v. Wickersham, 129 F. 2d 522; 5 BC.J.S. § 1996, p. 652.*

See particularly *Foster Bros. v. National Labor Relations Board, Supra,* in which the court said:

> "(1-3) We are clearly without power to grant the relief asked. Not only had the time for filing a petition for rehearing expired long before the petition was filed, but the term at which the decree was entered had expired also, the mandate of the court had issued and our jurisdiction over the cause had ended. It is well settled that an appellate court is without jurisdiction to recall its mandate after the expiration of the term at which decree was entered. • • • "

Moreover, the rules most generally adhered to are "that an appellate court is without power to recall a mandate regularly issued without inadvertence, fraud, prematurity, or misapprehension, and that it will not recall the mandate for the purpose of reexamining the

cause on its merits or to correct judicial error". *5B C.J.S. §1966, p. 650.*

Old precedents are perpetually being bombarded with new thoughts and ideas so that judicial concepts are continually undergoing reexamination and change. This does not mean that old judgments (correctly decided when entered) must be resurrected, reexamined and redecided with each new change in the law. The former opinion of the Court of Appeals (295 F. 2d 64) was correctly decided when rendered. The court is without jurisdiction or power to resurrect that judgment and to reexamine it in the light of recent decisions. Its power is necessarily limited to a review of the new judgment entered after retrial, upon the record in that case and in the light of existing precedents at the time of such decision.

A recent precedent has no greater jurisdictional force than the discovery of new evidence or new witnesses after the trial.

2. The Court's failure to consider the appeal from the judgment after retrial on its merits in the light of State Law existing at the time of such appeal is so manifestly against precedent and authority as to require the intervention of this Court.

Again, we wish to make it plain that the appeal from the judgment after retrial must be considered in the light of state law existing at the time of the appeal. *Messenger v. Anderson, supra.* The Court of Appeals was undoubtedly bothered by the fact that the appellant had failed

to put in issue the points decided by *Barnes v. Pennsylvania Threshermen Mutual Casualty Insurance Company, Supra.* All precedent and authority in the Fifth Circuit would require an affirmance of that judgment unless a timely objection was interposed and the point was directly decided by the lower court. See *Seaboard Air Line Railroad Company v. Horowitz (C.C.A. 5th 1960) 277 F. 2d 738; Sims v. Texas & N. O. R. Co., 5th Cir., 1959, 267 F. 2d 37; Cain v. Illinois Central R. Co., 5th Cir., 1959, 266 F. 2d 942; De Fonce Const. Co. v. City of Miami, 5 Cir., 1958, 256 F. 2d 425, certiorari denied 358 U.S. 875, 79 S. Ct. 115, 3 L. Ed. 2d 105; Ford v. United Gas Corporation, 5 Cir., 1958, 254 F. 2d 817, certiorari denied 358 U.S. 824, 79 S. Ct. 40, 3 L. Ed. 2d 64.*

The judgment of August 29, 1962 is a valid judgment based upon a jury verdict as a result of a retrial of the case following the mandate of the Court of Appeals. When a case is reversed and remanded for further proceedings, it is retried "as is the former appeal had not taken place". *3 Am. Jur. § 1240, p. 736.* The plaintiffs' appeal to the Court of Appeals brought on for review the correctness of the district court's judgment on the retrial and should have been judged on the record made in the lower court, just as any other case. The rulings of the trial judge should have been considered and weighed in the light of the assignments of error and the points argued on appeal. It is manifestly clear that the lower court cannot be found in error for having failed to follow the intervening state court decision unless the principles of such decision were put in issue by objections to the evidence, motions for directed verdict, requested charges, etc. See *DeWaters v. Macklin Co. (C.C.A. 6th 1948), 167 F. 2d 694, 699.* The reviewing court will apply the law

as it is at the time of review, "but the rule is not applicable where the issue has not been made in the trial court and the court's judgment does not include a ruling on the issue". See *DeWaters v. Macklin Co., Supra.*

Thus, if the second appeal had been considered and decided on the record, the court in our judgment would have been forced to affirm. The device of ignoring the judgment from which the appeal was taken and attempting to reinstate a former judgment which it was without jurisdiction to consider, is a practice that should be condemned and requires the intervention of this Court.

CONCLUSION

FOR THE FOREGOING REASONS A WRIT OF CERTIORARI SHOULD BE ALLOWED.

Dated: March 23, 1964.

Respectfully submitted,

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18485

MARYLAND CASUALTY COMPANY,

Appellant

versus

HARRY H. HALLATT and MARY VALENTINE HALLATT,

Appellees.

No. 20197

HARRY H. HALLATT, Individually and As Executor of the Estate of MARY VALENTINE HALLATT, Deceased,

Appellant,

versus

MARYLAND CASUALTY COMPANY,

Appellee.

Appeals from the United States District Court for the Southern District of Florida

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(January 10, 1964.)

Before RIVES and CAMERON, Circuit Judges, and HUNTER, District Judge.

Hunter, District Judge: The motion for reconsideration and rehearing in No. 18485 involves our initial decision in reversing and remanding a final judgment entered on a jury verdict in favor of plaintiffs, Harry Hallatt and Mary Valentine Hallatt, and against the garnishee, Maryland Casualty Company, for the sum of $9,267.52. The facts are detailed in that decision (295 F. 2d 64). The critical question was debated at length between the majority and dissenting opinions there. The majority held that the failure of the insured to attend the trial was prejudicial to the insurer as a matter of law, and that the lower court committed error in admitting evidence on the question of whether or not that failure was prejudicial. The dissent agreed with the District Court that the injured plaintiff had a right to show lack of prejudice and that the question of prejudice was a proper one for the jury.

This case was reversed and remanded and came on for retrial in the District Court again in accordance with the pronouncements of the majority. This resulted in a verdict and judgment in favor of Maryland, which was appealed to this Court on October 16, 1962. That appeal is now pending here (No. 20,197).

On November 5, 1962 the Florida Appellate Court for the Third District rendered its decision in *Barnes v. Threshermen and Farmers Mutual Casualty Insurance Company*, 146 So. 2d 119 (cert. denied 153 So. 2d 305). There, the Florida Court categorically and by name rejected the opinion of this Court and specifically adopted the dissenting opinion as correctly enunciating the law of Florida. On February 19, 1963, plaintiffs filed their motion for reconsideration and rehearing of our initial decision.

It is fair and accurate to say that the majority's opinion and the principles it stands for are not in accord with the clearly enunciated law of Florida. We know now that the law of Florida is and was at the time of the original trial in direct conflict with our holding. Are we to correct our error, now that the same suit is here a second time?

While *Erie*[1] made the law of the State effective to govern tort cases cognizable in federal courts on the sole ground of diversity, there was no necessity there for deciding at what step the state law would be finally determined. As a general rule, the decision of an appellate court in a case establishes the law of the case, not only for trial upon remand, but also for the appellate court itself upon subsequent review. But this rule is not an inexorable command, and must not be used to accomplish an obvious injustice.[2] We recognize that an appellate court's power to depart from its own ruling on a former appeal should be exercised sparingly and only in exceptional cases. This is an exceptional case. The litigation has not yet terminated. The initial error was our misapplication of governing state law. That error is revealed by an intervening clear enunciation emanating from a Florida Appellate Court.

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1 Erie R.R. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817.

2 United States v. Ohio Power Co., 353 U.S. 98; Messenger v. Anderson, 225 U.S. 436; Johnson v. Cadillac Motor Car Co. (1919, CA2 NY) 261 F. 878, 8 ALR 1023; Luminous Unit Co. v. Freeman-Sweet Co. (1924, CA 7 Ill), 3 F. 2d 577; Sedalia ex rel. Ferguson v. Shell Petroleum Corp. (1936, CA8 Mo) 81 F. 2d 193, 106 ALR 1327 (stating that the doctrine of the law of the case as applied to successive appeals, is not an absolute rule of law, but rather a rule of practice or procedure); Cochran v. M. & M. Transp. Co. (1940, CA1 RI) 110 F. 2d 519; Kaku Nagano v. Brownell (1954, CA7 Ill) 212 F. 2d 262 (recognizing that the doctrine of the law of the case is not an "ironclad rule").

This Court has jurisdiction of and will correct an initial opinion where as here, between the date of the initial decision and the time we are again called upon to pass upon the same case, a controlling state court has made a decision that we were "dead wrong." The Florida Court in *Barnes* has saved us from committing a miscarriage of justice. We are not insensible to possible complications but are of the opinion that under the total circumstances it is our duty to conform our decision to the supervening decision of the State Court, such decision being under *Erie* the right decision.

We conclude that the failure of the insured to attend the trial was not, as a matter of law, prejudicial to the insurer. The question of prejudice was a proper issue for the jury. *Barnes v. Threshermen and Farmers Mutual Casualty Insurance Company*, 146 So. 2d 119 (cert. denied 153 So. 2d 305). The District Court properly submitted to the jury that issue, together with the issues of good faith and diligence of Maryland and the excuse of Richardson for non-attendance. The evidence was adequate to sustain the jury verdict. The trial was free from any significant error.[1]

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[1] Maryland specified 29 errors. Twenty-one were directed at the District Court's refusal to set aside the verdict. Seven complained of erroneous instructions. We are satisfied that the charge as a whole correctly stated the relevant principles of law in accordance with the law of Florida. The remaining specification complained of the District Court's action in permitting plaintiffs' counsel to cross-examine Maryland's witnesses as to whether Richardson's testimony would have helped Maryland. One witness answered: "I cannot say." The other answered: "It is conjecture, it is guess work." The jury could have inferred from the direct examination of these witnesses that Richardson's testimony was very important. Surely, the plaintiff had a right to cross-examine, to counteract that inference.

Accordingly, we now grant the petition for rehearing in Civil Action 18485, vacate our initial opinion and order therein, and affirm the judgment of the District Court rendered on June 17, 1960.

The appeal in Civil Action No. 20197 is now moot and it is remanded to the District Court to enter such orders as it may deem necessary, consistent with this opinion.